

May 21, 2007

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re:     *Ex Parte* of Neutral Tandem, Inc.; WC Docket No. 06-159**

Dear Ms. Dortch:

Neutral Tandem, Inc. ("Neutral Tandem") files this *ex parte* to provide the Commission information relating to the recent *ex parte* communications filed by Level 3 Communications, LLC ("Level 3") in this docket, in which it discussed disputes pending between Neutral Tandem and Level 3 before several state public utility commissions. Specifically, Neutral Tandem attaches hereto the Direct Testimony of Jeffrey H. Hoagg, Principal Policy Advisor of the Telecommunications Division of the Illinois Commerce Commission, ICC Docket No. 07-0277 (dated May 18, 2007). Neutral Tandem also provides the Mediator's Recommendation in Case No. U-15230 before the Michigan Public Service Commission (dated May 21, 2007). Pursuant to Section 203a(6) of the Michigan Telecommunications Act, the Mediation Decision is not to be disclosed to the Michigan Commissioners or other Michigan PSC decision makers.

Pursuant to the Commission's Rules, this letter is being filed in the above-captioned proceedings for inclusion in the public record. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

\_\_\_\_\_  
/s/  
Ronald W. Gavillet  
Executive Vice President of External Affairs  
Neutral Tandem, Inc.  
1 South Wacker Drive, Suite 200  
Chicago, IL 60606  
Telephone: (312) 384-8040  
Facsimile: (312) 346-3276

cc:     Donald Stockdale  
        Albert Lewis  
        Deena Shetler  
        Victoria Goldberg  
        Jay Atkinson

DIRECT TESTIMONY  
OF  
JEFFREY H. HOAGG

PRINCIPAL POLICY ADVISOR  
TELECOMMUNICATIONS DIVISION  
ILLINOIS COMMERCE COMMISSION

Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC  
vs.  
Level 3 Communications, LLC

DOCKET NO. 07-0277

MAY 18, 2007

1 **Introduction**

2

3 **Q. Please state your name and business address.**

4 A. My name is Jeffrey H. Hoagg. My business address is 527 East Capitol  
5 Avenue, Springfield, Illinois 62701.

6

7 **Q. By whom are you employed and in what capacity?**

8 A. I am employed as the Principal Policy Advisor in the Telecommunications  
9 Division of the Illinois Commerce Commission

10

11 **Q. Please briefly describe your educational background and work  
12 experience.**

13

14 A. I have been employed by the Illinois Commerce Commission in the  
15 Telecommunications Division from 2000 to the present. During this time,  
16 I have conducted analyses and provided policy recommendations on a  
17 wide range of telecommunications issues, and have provided testimony on  
18 behalf of Staff of the Illinois Commerce Commission in various docketed  
19 proceedings. Prior to this, I held the positions of Telecommunications  
20 Tariffs and Rates Analyst, Telecommunications Policy Analyst, and  
21 Special Assistant to the Deputy Chair of the Commission at the New York  
22 Public Service Commission. I performed economic and policy analyses  
23 of industry and regulatory issues, and formulated recommendations for

Commission members and other decision-makers. In 1993-94 I served as Special Advisor to Commissioner Barrett of the Federal Communications Commission. I provided analyses and policy recommendations on a wide range of telecommunications issues. Among other activities, I prepared testimony, speeches and presentations for delivery to Congress and various regulatory and industry groups, and drafted informal and formal documents for issuance.

I hold a Master of Arts degree in Economics from Cornell University, and completed all requirements for the Ph.D. in Economics from Cornell other than the dissertation. My major field of graduate study was Industrial Organization and Regulation.

### **Overview**

**Q. What is the purpose of your testimony?**

A. I explain why I believe the Commission can and should resolve this dispute, and why I believe Neutral Tandem's complaint has merit.

**Q. Please provide your understanding of the service(s) and rate(s) that are at the core of this dispute.**

A. My understanding is that, at bottom, this dispute concerns the appropriate mechanism of recovery for the costs of "transport and termination" of local traffic Neutral Tandem conveys to Level 3 (for termination to Level 3's end

48 users). This local traffic is originated by third party carriers, “transits”  
49 Neutral Tandem’s switch and transport facilities, and is then handed off to  
50 Level 3. Under FCC rules, Level 3 is entitled to compensation for  
51 terminating such local traffic, provided it is indeed terminated<sup>1</sup> on Level 3’s  
52 network. Such compensation is termed “reciprocal compensation”, and is  
53 payable by originating carriers. FCC rules govern the applicable methods  
54 for recovery of such compensation, and in some cases, appropriate rate  
55 levels.

56  
57 While the dispute between Level 3 and Neutral Tandem possesses  
58 several different elements, it appears that the liability to pay reciprocal  
59 compensation lies at its core. Level 3 and Neutral Tandem apparently  
60 disagree over which party or parties are liable to Level 3 for payment of  
61 reciprocal compensation due Level 3 for its services in terminating traffic  
62 to its end users. Level 3 believes Neutral Tandem can be held liable,  
63 while Neutral Tandem believes the third party originators of this local  
64 traffic are solely liable for payment of reciprocal compensation.

65  
66 In Neutral Tandem’s view, Level 3 should properly recover its costs of  
67 terminating this traffic from the respective third-party carriers which  
68 originate the traffic, in the form of per-minute charges (at applicable

---

<sup>1</sup> I use the word “termination” in this testimony in a manner consistent with the definition contained in 47 C.F.R. §51.701(d).

reciprocal compensation payment rates).<sup>2</sup> In contrast, Level 3 argues it may appropriately charge a non-zero rate to Neutral Tandem for its termination of the transit traffic received from Neutral Tandem.

I believe the Commission can and should rule on the liability of Neutral Tandem to pay reciprocal compensation, and, as needed, the appropriate just, reasonable and non-discriminatory rate (and method of cost recovery) for termination of this traffic.

**Q. Are there any overarching policy propositions you believe should guide the Commission's determinations in this matter?**

A. Yes. I recommend that, from a policy perspective, the Commission's determinations in this proceeding be guided by and consistent with the following basic propositions:

- The Commission can and should, where necessary, review interconnection and traffic exchange arrangements between CLECs to ensure these are consistent with the public interest, and that these do not violate provisions of any applicable statute or regulation
- The public interest is served by Commission review of interconnection and traffic exchange arrangements between Level 3 and Neutral Tandem to ensure pertinent terms and conditions are just and reasonable (and consistent with applicable statute or regulation)
- The "calling party network pays" principle that governs ILEC traffic exchange also properly applies to traffic exchanged between CLECs.

---

<sup>2</sup> Among other things, Neutral Tandem points out that Level 3 does not impose a per-minute charge on AT&T for tandem transit traffic it receives from AT&T in Illinois.

**Commission Review of CLEC Interconnection Arrangements**

**Q. Please summarize your views concerning Commission review of interconnection arrangements between CLECs.**

A. While I am not an attorney, and this is a legal issue that will be addressed in the Staff's briefs, I believe the Commission has the authority under state statute to review interconnection and traffic exchange arrangements between CLECs. I also believe the standards for review of such arrangements are not as stringent as those applicable to ILEC interconnection and traffic exchange arrangements.

Further, as a public policy matter, I believe the Commission should hear and resolve this dispute between CLECs. Section 13-103 of the Illinois PUA<sup>3</sup> declares establishment and maintenance of competitive telecommunications markets to be a fundamental policy of the state of Illinois (subject to considerations such as reasonable and non-discriminatory rates and charges). To help advance this general policy, Section 13-514 of the PUA<sup>4</sup> prohibits telecommunications carriers from acting in a manner that would impede the development of competition in any telecommunications market. Section 13-702<sup>5</sup> further promotes this competitive policy by requiring that traffic be exchanged between carriers

---

<sup>3</sup> 220 ILCS 5/13-103  
<sup>4</sup> 220 ILCS 5/13-514  
<sup>5</sup> 220 ILCS 5/13-702

without delay or discrimination, pursuant to the physical interconnection arrangements made between carriers.

In my view, the services at issue in this proceeding are “telecommunications services” as defined in Section 13-203 of the PUA,<sup>6</sup> and are subject to Commission review. Thus, I believe, Sections 13-103, 13-514, 13-701 (and other applicable provisions of the PUA) are fully applicable to the resolution of this dispute.

In my opinion, the only reason the Commission should decline to rule on the terms and conditions of interconnection and traffic exchange between Level 3 and Neutral Tandem in this dispute is if it is explicitly precluded from doing so by applicable state or federal statute or regulation. No such legitimate preclusion has yet been raised in this proceeding, and I am unaware of any such preclusion by statute or regulation.

**Q. Level 3 contends that “...forcing two competitive providers into a regulated agreement, or forcing them to stay in an otherwise commercially negotiated agreement...” (Gates Direct Testimony at page 5) is not in the public interest. Do you agree?**

**A.** In this instance, I disagree. It is generally true that, where the terms and conditions of so-called “commercially negotiated agreements” between carriers do not raise public interest issues (such as whether the rates



involved are just and reasonable), Commission review is not necessary. However, where a dispute between carriers involves precisely such matters, Commission review is in the public interest. Indeed, Commission review may be required to ensure that telecommunications traffic is appropriately exchanged between carriers.

As a general (and practical) matter, the Commission does not review the terms and conditions governing interconnection and traffic exchange arrangements between CLECs. Unlike instances involving ILECs, bargaining power in arrangements between two CLECs generally is regarded as roughly equal, and neither party is generally thought able to wield undue market power. Accordingly, federal law does not prescribe state Commission review of such agreements. But this does not imply the Commission can not and should not review such arrangements between CLECs when specific issues of concern arise, as in this instance.

We should be mindful that it is not the agreement per se between carriers (two CLECs in this instance) that is of central importance. Rather, the interconnection and traffic exchange arrangements (and the terms and conditions thereof) are central to competitive policy. The purpose of interconnection between carriers is, of course, to enable exchange of traffic. Interconnection is pointless absent traffic exchange. Traffic exchange, subject to appropriate terms and conditions, is essential to

---

<sup>6</sup> 220 ILCS 5/13-203

competitive telecommunications markets and services. Without reliable and efficient traffic exchange, the “network of multiple interconnected networks” essential to competitive telecommunications markets will either function poorly or not at all. It follows that, from a policy perspective, regulatory oversight, where required, of terms and conditions governing interconnection and traffic exchange between all carriers is necessary and appropriate.

**Q. What standards of review are appropriate for Commission examination of the terms and conditions governing the exchange of traffic between these two CLECs?**

A. Most fundamentally, these terms and conditions can be reviewed for consistency with the general public interest. For example, if these terms and conditions result in the non-completion of calls placed by end-users, serious public interest issues are raised. Beyond this, rates and cost recovery mechanisms involved in the interconnection and traffic exchange arrangements between these CLECs are appropriately reviewed, pursuant to applicable PUA provisions, and other applicable statutory or regulatory provisions. Further, Illinois has established particular requirements, embodied in Section 13-514 of the PUA, that permit a carrier to file a complaint alleging that another carrier has engaged in certain prohibited conduct with respect to interconnection, and seek a Commission determination remedying such misconduct.

**Applicable Statutes, Rules or Regulatory Determinations**

**Q. In your opinion, are FCC rules regarding reciprocal compensation pertinent to this proceeding?**

**A.** Yes. I believe Rule 51.701(e) is applicable:

For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier. *[emphasis added]*

In my opinion, since the traffic at issue in this docket does not originate on Neutral Tandem's network, unless Rule 51.701(e) is modified or overridden by a countervailing rule, applicable statute or regulation (or perhaps agreement between the parties), Neutral Tandem cannot be held liable by Level 3 for reciprocal compensation payments. Rather, these are due Level 3 from the carriers upon whose network(s) the traffic at issue originates. These carriers are the CLECs that have retained Neutral Tandem to provide transiting service. I am unaware of any other statute, rule, or other regulation modifying or overriding Rule 51.701(e) in a manner which would make Neutral Tandem, as a tandem transit provider, liable for reciprocal compensation payments. I note that application of Rule 51.701(e) is not restricted to traffic originating and/or terminating on ILEC networks.

217 **Q. Does the Commission have authority, under federal rules, to**  
218 **determine reciprocal compensation rates for traffic exchanged**  
219 **between Level 3 and Neutral Tandem?**

220 A. In my opinion, the Commission has such authority. FCC Rule  
221 51.711(a)(2) provides that:

222 In cases where both parties are incumbent LECs, or neither  
223 party is an incumbent LEC, a state commission shall  
224 establish the symmetrical rates for transport and termination  
225 based on the larger carrier's forward-looking costs.  
226 [emphasis added]  
227

228  
229  
230 **Q. Has the Commission previously addressed originating carriers'**  
231 **responsibility for paying reciprocal compensation (to terminating**  
232 **carriers) when an intervening tandem provider or other transiting**  
233 **carrier is utilized?**

234 A. Yes. The fact circumstances in Commission Docket No. 04-0040 differ in  
235 certain respects from the instant dispute, but I believe the principles  
236 underlying a Commission determination in that proceeding apply here.<sup>7</sup>  
237 In Docket 04-0040, certain LECs argued they were not liable for payment  
238 of reciprocal compensation to terminating carriers for traffic routed through  
239 third-party carriers. The Commission rejected this argument, stating that:

240 Respondents disingenuously argue that there can be no  
241 reciprocal compensation because there is no reciprocal  
242 traffic. Contrary to FCC rules, they assert that all of the  
243 outgoing traffic is interexchange carrier traffic for which they  
244 are not responsible. That is, calls initiated on their networks  
245 that terminate with CMRS carriers are not reciprocal traffic

---

<sup>7</sup> Among the differences: Docket 04-0040 involved CMRS providers and the LECs argued the intervening tandem transit services were interexchange in nature.

because intervening exchange carriers transport the calls.  
We reject this argument.

**Q. Are there any other FCC determinations you believe the Commission may find pertinent?**

A. The Commission may find a 2001 FCC decision in CC Docket No. 96-262 concerning CLEC access charges of interest.<sup>8</sup> This 2001 Order was aimed at ensuring CLEC rates for interstate switched access services are just and reasonable. Among other things, the FCC determined that its previous policies had not always yielded CLEC access rates within a “zone of reasonableness”. It decided to place certain constraints on CLEC tariffed access rates in order to “more closely...align tariffed CLEC access rates with those of the incumbent LECs.”<sup>9</sup> A fundamental FCC objective was to reduce at least some CLEC access rates.

This is pertinent for at least two reasons. First, it shows the FCC has taken regulatory action concerning intercarrier charges imposed by CLECs. In my view, the same public interest considerations that led to FCC constraints on CLEC termination rates for interexchange traffic demonstrate this Commission’s legitimate interest in CLEC rates charged for local traffic termination in Illinois - specifically the rate Level 3 seeks to charge Neutral Tandem.

---

<sup>8</sup> *In the Matter of Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146, Released April 27, 2001.

<sup>9</sup> *Id.* at Par. 3.

268  
269 Second, the FCC was persuaded that “both the terminating and originating  
270 access markets as consisting of a series of bottleneck monopolies over  
271 access to each individual end user”.<sup>10</sup> While markets for local traffic  
272 termination and origination differ in some respects from those for  
273 interexchange traffic, there are significant similarities. It is generally  
274 recognized that network functions involved in termination of local traffic  
275 and termination of access traffic are identical (or nearly so). It is also  
276 generally accepted that, at minimum, termination of local and access  
277 traffic has bottleneck properties. Since an end user typically subscribes to  
278 a single LEC, other carriers needing to deliver calls to that end user have  
279 no choice but to utilize that single LEC for termination, raising elements of  
280 a “terminating monopoly”. It is legitimate for the Commission to consider  
281 whether Level 3 is seeking to leverage that bottleneck control in the  
282 instant dispute.

283  
284 **Additional Responses to Level 3 Testimony**

285  
286 **Q. Level 3 argues that Neutral Tandem’s position yields the result that**  
287 **“Level 3 as the terminating carrier should have no choice among the**  
288 **two transit providers that deliver originated traffic”. Gates page 8**  
289 **What is your assessment of this argument?**

---

<sup>10</sup> Id. at Par 30.

290 A. This causes me some concern. One important objective of the General  
291 Assembly and Commission is to provide all participants in competitive  
292 telecommunications with choice. However, Level 3's position raises  
293 questions that I find more troublesome. The third-party CLECs originating  
294 the traffic at issue in this dispute have chosen Neutral Tandem to transit  
295 their traffic to Level 3's network for termination. Neutral Tandem  
296 effectively is nothing more than an extension of the networks of these third  
297 party carriers. If adopted, Level 3's position would deprive these  
298 originating carriers of their choice of transit providers, effectively forcing  
299 them to utilize AT&T's tandem transit services, or to interconnect directly  
300 with Level 3.

301  
302 On balance, based on the record in this proceeding to date, I favor Neutral  
303 Tandem's position concerning this aspect of the dispute. First, the third  
304 party carriers are purchasing and paying for the tandem transit services  
305 utilized, and should be able to select the tandem provider of their choice.  
306 Second, they are paying for the termination services provided by Level 3  
307 (or should be, unless they and Level 3 have agreed to exchange traffic on  
308 a bill and keep basis). In any event, these CLECs should have choice in  
309 how their traffic is delivered to Level 3. Finally, the fact that termination is  
310 (at least to some degree) a bottleneck service argues for ensuring choice  
311 for originating providers where feasible.

I further note that these conflicting considerations perfectly illustrate the need, under certain circumstances, for Commission review of CLEC interconnection and/or traffic exchange arrangements. As in this case, the Commission may need to resolve disputes and conflicting considerations based on the respective equities involved, and in light of public interest considerations.

**Q. Level 3 contends that “Neutral Tandem is in a sense a “reseller” of termination services, except it is not purchasing for resale the termination services from Level 3 or other similar carriers”. (Gates Direct Testimony at page 22). What is your assessment of this characterization?**

**A.** The Commission should dismiss this characterization as inaccurate unless Level 3 can show that Neutral Tandem, in the purported role of “termination reseller”, collects actual reciprocal compensation payments from originating carriers (either in the stead of, or perhaps on behalf of, Level 3). I am unaware of anything in the record of the proceeding to suggest this, and have no basis to believe that it is the case.

**Q. Level 3 states that “while Neutral Tandem would like to think it can sell Level 3’s termination services to its clients and not have to pay for that service, such is not the case. It is not unreasonable for Level 3 to expect payment for use of its facilities and services.” (Gates**



336           **Direct Testimony at page 23). What is your reaction to this**  
337           **statement?**

338    A.    I agree with Level 3 that it is wholly reasonable for it to receive payment  
339           for the facilities and services it provides in terminating traffic received from  
340           originating carriers. Under FCC rules, Level 3 clearly is entitled to such  
341           payment. However, FCC rules prescribe that such payment is due from  
342           the carriers whose end users actually originate the traffic destined for  
343           completion (i.e., termination) to Level 3's end users. Pursuant to FCC  
344           rules, this payment (termed, as noted above, reciprocal compensation) is  
345           not due from a tandem transit provider, which does not originate the traffic  
346           in question.

347  
348    **Q. Does this conclude your testimony?**

349    A.    Yes.

350

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

\* \* \* \* \*

In the matter of the complaint and request for	)	
emergency relief of <b>NEUTRAL TANDEM, INC.</b> ,	)	Case No. U-15230
against <b>LEVEL 3 COMMUNICATIONS, LLC.</b>	)	
_____	)	

**MEDIATOR'S RECOMMENDATION**

**1.**

**BACKGROUND AND HISTORY OF PROCEEDINGS**

On March 1, 2007, Neutral Tandem, Inc. (Neutral Tandem), filed a complaint and request for emergency relief concerning interconnection issues with Level 3 Communications, LLC (Level 3), pursuant to the provisions of MCL 484.2203. In the complaint, Neutral Tandem requested the Commission to: (1) establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 and its subsidiaries and (2) issue an order for emergency relief directing Level 3 to avoid blocking traffic terminating from Neutral Tandem over the parties' existing interconnection until a final order is issued in this case.

Neutral Tandem asserts that Level 3's actions or threatened actions violate Section 305(a) and (b) of the Act, MCL 484.2305(a) and (b). It asserts the Commission has authority to resolve these issues in this proceeding pursuant to MCL 484.2204, which provides that if two telecommunications carriers cannot agree on interconnection issues, or matters prohibited by Section 305, either carrier may petition the Commission for assistance in resolving the issues.

On March 7, 2007, Level 3 filed an answer to the request for emergency relief in which it states that Neutral Tandem's failure to make alternative arrangements for traffic it desires to deposit on Level 3's network has created a crisis for which Neutral Tandem now seeks emergency relief. Level 3 argues that Neutral Tandem has merely filed this complaint, rather than seek out alternatives for the traffic. Level 3 stated it is willing to maintain the existing arrangements with Neutral Tandem until June 25, 2007 (94 days beyond the March 23, 2007 deadline). Level 3 reasons that Neutral Tandem's emergency relief request is moot since the extension of time it provided eliminates the sole basis for Neutral Tandem's application for emergency relief and requested that the Commission deny that relief. Finally, Level 3 requested that the Commission mediate an alternative means to resolve the complaint pursuant to MCL 484.2203a.

The Commission's Order dated March 21, 2007 found that Neutral Tandem's request for emergency relief should be denied without prejudice. The Commission reasoned that there were no exigent circumstances, based in part on Level 3's commitment to continue providing service to Neutral Tandem until June 5, 2007. Moreover, the Commission noted that MCL 484.2203(13) prohibits a provider from discontinuing service while a complaint is pending before the Commission, if the complainant has provided adequate security in an amount determined by the Commission. The Order stated that if the parties were unable to resolve this complaint before the deadline established by Level 3's commitment, Neutral Tandem could seek protection under this section.

Having resolved the request by Neutral Tandem for Emergency Relief the Commission further found that MCL 484.2203(14) should be invoked and the parties should be directed to engage in alternative dispute resolution as provided in MCL 484.2203a.

On April 11, 2007, Administrative Law Judge James N. Rigas ordered the parties to mediate this dispute before Mr. Thomas Saghy (Mediator) and set May 21, 2007 as the date for the Mediator to file a sealed recommended settlement. Administrative Law Judge Rigas also indicated that, should either party reject the Mediator's recommended settlement, Administrative Law Judge Sharon L. Feldman will hold a pre-hearing conference in this matter on June 6, 2007.

By letter dated April 13, 2007 the Mediator established a procedural schedule under which both parties were to submit a Statement of Position and Proposed Terms of Settlement by noon, Friday, April 20, 2007. Subsequently, Level 3 counsel contacted the Mediator and requested an extension of time for the initial filing until 5:00 PM, April 20, 2007. The Mediator determined through discussion with the parties an extension was amenable to both and granted the extension. The procedural schedule additionally established that Responses to the April 20, 2007 filings, if deemed necessary, were required by noon, Friday, April 27, 2007

On April 19, 2007, Neutral Tandem filed a motion pursuant to MCL § 484.2203(13), requesting the Commission determine the adequate amount and form of security to be provided by Neutral Tandem pending the resolution of its Complaint.

On April 20, 2007 Neutral Tandem filed a Petition for Rehearing regarding the form and adequate amount of security to be provided pending resolution of its Complaint. The petition was filed as a safeguard to ensure that in one way or another the Commission determined the appropriate form and amount of security required in a timely manner considering the Commission meeting dates and the cut-off date set by Level 3 of June 25, 2007, pending the completion of the complaint proceeding sometime after that date.

By letter dated April 24, 2007 Administrative Law Judge Sharon Feldman responded to an e-mail request by Neutral Tandem that a hearing be scheduled to consider Neutral Tandem's

April 19, 2007 Motion. ALJ Feldman stated that her review of the motion concluded that it was not appropriate to schedule a hearing at this point in the proceeding due to the fact that this matter is currently in mediation. The ALJ stated her belief that she lacked authority to act as a presiding officer unless the mediation is rejected and this matter proceeds to an evidentiary hearing.

On April 27, 2007, both Neutral Tandem and Level 3 Communications filed Responses to the Statement of Positions and Proposed Terms of Settlement filed on April 20, 2007.

## II.

### **POSITIONS OF THE PARTIES**

#### **1. NEUTRAL TANDEM:**

Neutral Tandem's Statement of Position indicates this case arises from Level 3's demand to receive "reciprocal compensation" payments from the wrong party. Under Michigan law, Level 3 is entitled to recover reciprocal compensation payments from carriers that *originate* traffic that is sent to Level 3's network. Neutral Tandem does not originate any traffic to Level 3. Instead, Neutral Tandem provides "tandem transit" services, which allow other carriers' originating traffic to be delivered to Level 3. As a tandem transit carrier, Neutral Tandem is obligated by Michigan law to provide Level 3 with information that will allow Level 3 to identify and bill the originating carriers. Neutral Tandem has complied and will continue to comply with that obligation. In addition Neutral Tandem indicated that Level 3 has threatened to disconnect its existing interconnections with Neutral Tandem and refuse to accept terminating traffic from Neutral Tandem unless Neutral Tandem agrees to make reciprocal compensation payments. Neutral Tandem believes that Level 3's threat to terminate its existing interconnections is contrary to Michigan law.

Neutral Tandem stated that it is the telecommunications industry's only independent provider of "tandem transit" services. Neutral Tandem offers tandem transit services to approximately 15 different CLECs, wireless carriers, and cable companies throughout Michigan, and in over 60 LATAs nationwide. In Michigan, Neutral Tandem indicates it interconnects thirty-five switches and transits over 300,000,000 minutes of telecommunications traffic per month. Neutral Tandem's transiting activities allow these carriers an alternative means to interconnect and exchange local traffic with each other, without using incumbent LEC tandem transit services.

Tandem transit service refers to the switching of telecommunications traffic that is originated on the network of an originating carrier, and the delivery of that traffic to a different terminating carrier. Typically, an originating carrier chooses to utilize a tandem transit provider to deliver traffic to terminating carriers with which the originator has not established direct interconnections.

Neutral Tandem states that the Michigan Telecommunications Act (MTA) directly addresses the compensation responsibilities applicable to carriers in the transiting context, which are at issue in this proceeding. Neutral Tandem interprets Section 305a to provide that the *originating* carrier is responsible for making the "reciprocal compensation" payments used to compensate the terminating carrier for use of its facilities. To effectuate this principle, Section 305a *requires* a "provider that originates an intrastate call" subject to reciprocal compensation to "agree to establish a reciprocal compensation arrangement" with the terminating carrier "for the termination of those calls. To facilitate the payment of reciprocal compensation when a transiting carrier is involved in call delivery, Section 305a requires originating carriers to provide the transiting carrier with the "telephone number" for an originating call "without alteration in the

network signaling information” that identifies the originating carrier. In turn, Section 305a requires the transiting carrier to pass that information on to the terminating carrier. This allows the terminating carrier to identify the carriers that are originating traffic being sent to the terminating carrier’s network, so the terminating carrier can bill the originating carriers. Section 305a establishes specific procedures terminating carriers such as Level 3 can utilize to obtain reciprocal compensation from originating carriers. Section 305a requires that an originating carrier “agree to begin negotiations” no more than 30 days after receiving a request for reciprocal compensation from a terminating carrier such as Level 3. During the negotiation period, the originator must pay reciprocal compensation to Level 3 “under an interim arrangement. If Level 3 has a dispute with an originating carrier over reciprocal compensation, Section 305a provides that the Commission can “resolve disputes under this section between originating and terminating providers related to negotiation of the reciprocal compensation agreement.

Section 305a spells out the role of Neutral Tandem in the compensation process. Section 305a provides that the transiting carrier is responsible to “transmit the telephone number of the party originating the call to the extent such information has been provided by the originating carrier...without alteration in the network signaling information.” The transmission of this information is intended to facilitate the ability of Level 3 to collect reciprocal compensation from the *originating* carrier. Neutral Tandem states that it provides Level 3 with all information necessary to identify the carriers that originate the traffic Neutral Tandem delivers to Level 3’s network.

Neutral Tandem cites a clear delineation of compensation responsibilities in the transiting context under Michigan law where the Commission found that a transiting carrier should not

“have to act as a billing agent or conduit for compensation between carriers that transit its network”, (Order Case No. U-12465, November 20, 2000, pg. 19).

Neutral Tandem also states that it is undisputed that Level 3 neither can nor does demand that AT&T or Verizon, the ILEC competitors to Neutral Tandem’s transit service, pay reciprocal compensation when they deliver transited traffic to Level 3. Therefore, in addition to violating MTA Section 305a, Level 3’s demand that Neutral Tandem pay reciprocal compensation that it does not require from the ILECs, runs afoul of the prohibition in the MTA against “[d]iscriminat[ing] against another provider by refusing or delaying access service to the local exchange”.

Neutral Tandem states that Level 3’s attempt to obtain reciprocal compensation payments from Neutral Tandem not only violates Michigan law, but also hinders competition in the provision of transiting services. The Commission has found that tandem transit service is important in order to help allow “a competitive marketplace to flourish.” (Commission Order, November 26, 1996, Case No. U-11151-11152, pg.14)

The Commission also has noted, in comments to the FCC regarding the *Missoula* plan, that it is concerned about the development of competitive alternatives to the ILECs’ tandem transit services (MPSC Reply Comments, Feb. 1, 2007, pg. 3-4) Level 3’s refusal to abide by MTA Sections 305(a) and (b) threatens to undermine the only independent provider of tandem transit services in Michigan, in contravention of the Commission’s stated interest in promoting competition in the tandem transit market.

In summary Level 3’s Statement of Position seeks to force Neutral Tandem to make reciprocal compensation payments that: (1) Section 305a directs Level 3 to recover from originating carriers; (2) the MPSC already has said transiting carriers are not obligated to make;



and (3) Level 3 could obtain under Michigan law by billing originating carriers. Level 3's claim that Neutral Tandem is obligated to make reciprocal compensation payments when it transits other carriers' originating traffic to Level 3 is contrary to Michigan law.

In response to Level 3's Statement of Position and Proposed Terms of Settlement Neutral Tandem states that the Mediator should adopt Neutral Tandem's proposed terms of settlement, and reject Level 3's proposed terms, for three reasons. *First*, Level 3's claim that the Commission lacks authority to establish nondiscriminatory terms and conditions for interconnection between Neutral Tandem and Level 3 is merit-less and should be rejected. *Second*, Level 3's proposed terms are patently unreasonable and discriminatory, and are premised upon distortions of the parties' prior relationship. *Third*, Level 3's request for an in-person mediation session is unnecessary and self-serving.

#### LEVEL 3:

Level 3 states that on March 1, 2007, Neutral Tandem filed its complaint alleging Neutral Tandem has a statutory right to directly interconnect with Level 3 for the purposes of routing transit traffic to Level 3's customers. Neutral Tandem asks that the Commission establish the rates, terms and conditions for the exchange of transit traffic between Neutral Tandem and Level 3.

There have been several agreements between Level 3 and Neutral Tandem with terms and conditions for the bridging of traffic between end user customers of other carriers and Level 3's customers. One agreement was for calls delivered from Neutral Tandem to Level 3 for termination ("Level 3 Agreement."), another for calls delivered by Level 3 to Neutral Tandem and transited to another carrier. Level 3 also inherited two agreements between Neutral Tandem and ICG Communications ("ICG") and Broadwing Communications ("Broadwing"), two carriers

acquired by Level 3. These two agreements established the terms and conditions for ICG's and Broadwing's purchase of services from Neutral Tandem. Each agreement contained provisions that permitted either party to terminate the agreement on 30 days notice.

On January 30, 2007, Level 3 provided written notice to Neutral Tandem that its contract with Level 3 was terminated as of March 1, 2007, and the Broadwing agreement was terminated as of March 23, 2007. Level 3 unilaterally elected to allow the continued delivery of traffic by Neutral Tandem until June 25, 2007 only for the limited purpose of allowing Neutral Tandem and its customers more time to find alternative means of routing traffic to Level 3. Level 3 has advised Neutral Tandem that it is ready and willing to establish a migration plan to ensure that all traffic originated by other carriers will be routed properly to Level 3's customers.

Level 3 states it already has interconnection arrangements with ILEC transit providers that would allow the originating carrier to terminate traffic to Level 3. Level 3 felt it was maintaining a duplicative interconnection arrangement that solely benefited Neutral Tandem, on terms and conditions no longer reflective of a balanced commercial arrangement as contemplated by the original agreements. Level 3 states that it has made several attempts to reach a successor agreement with Neutral Tandem which have failed. Level 3 believes Neutral Tandem's position switched from an agreement whereby it would compensate Level 3 for traffic terminated by Neutral Tandem, to proposals where Neutral Tandem expected Level 3 to obtain compensation solely from the originating carriers that route traffic through Neutral Tandem for termination to Level 3.

Level 3 believes the mediation process is not the place for the Commission to make a determination of its jurisdiction over traffic exchanged between Level 3 and Neutral Tandem. However Level 3 states it is willing to mediate, without waiving its objections to the jurisdiction

of the Commission to grant the relief requested in the underlying complaint. Level 3 disputes the material allegations of the Complaint, and does not believe there is any state or federal obligation of Level 3 to directly interconnect or exchange a third-party carrier's traffic through Neutral Tandem. Level 3 believes the Commission lacks authority to set the rates, terms and conditions for the exchange of third-party traffic between Neutral Tandem and Level 3 which would be appropriately established only through commercial negotiations, not by order of the Commission.

Regarding its obligation to interconnect with Neutral Tandem, Level 3 cites Section 251 of the Federal Communications Act. Level 3 states neither Section 251(a) nor Section 251(c) requires that Level 3 and Neutral Tandem establish an interconnection agreement that compels the other party to directly interconnect. Level 3 believes the proposition that each carrier has a legal obligation to directly interconnect with each other carrier is absurd, and is both technically and economically infeasible. Level 3 has a duty under Section 251(a)(1) to directly or indirectly interconnect with Neutral Tandem and other carriers that may wish to use Neutral Tandem's services. However, Section 251(a)(1) does not create an obligation on Level 3 to directly interconnect with Neutral Tandem to accept another carriers' traffic.

Level 3 additionally believes the MTA does not compel Level 3 to interconnect directly with Neutral Tandem for the exchange of traffic originated by another carrier's end user customers. Section 305a(2) of the MTA, MCL Sec. 484.2305a, provides that the Commission may initiate proceedings under section 203 to resolve disputes between providers regarding "identification of traffic and disputes regarding compensation rights and obligations between providers who originate, forward, or terminate intrastate traffic." However, this provision does not specifically compel Level 3 to establish a direct interconnection agreement with Neutral

Tandem, and does not compel Level 3 to deliver tandem traffic termination services to Neutral Tandem for free.

Level 3 states that since the Commission does not have authority to compel the creation of an interconnection agreement between Level 3 and Neutral Tandem, Level 3 proceeds with the mediation without waiving its objections to the Commission's authority to grant the relief requested by the Complaint.

Level 3 states that it is willing to mediate the terms and conditions of a successor agreement with Neutral Tandem. However, Neutral Tandem should also be compelled to mediate the process for the un-winding of the traffic exchange arrangement between the parties to avoid the claimed, but unsupported, harm.

Level 3 states that it is willing to enter into a successor agreement for the exchange of traffic in Michigan with Neutral Tandem on rates, terms and conditions that are reached through commercial negotiations (even with the assistance of a mediator appointed by the Michigan Commission). Level 3 opposes the imposition of terms and conditions by the Commission.

The substance of Level 3's proposed terms and conditions for the exchange of traffic are set forth on Level 3's confidential Exhibit B. Additional terms and conditions relating to billing, the exchange of call records, and the format of these call records were also to be required. These additional terms would be terms and conditions typical of other industry agreements according to Level 3. Level 3 states if they are to have any discussions on a successor agreement, Neutral Tandem would have to agree to the terms and conditions set forth on Exhibit B.

Level 3 summarizes its mediation position as follows:

- 1) It is undisputed that Level 3 properly and lawfully terminated its traffic exchange agreement with Neutral Tandem.

- 2) The Commission lacks authority to compel Level 3 to establish the economic terms and conditions for an interconnection agreement with Neutral Tandem where neither of the carriers are incumbent local exchange carriers;
- 3) The mediation efforts should focus on a transition plan to unwind the traffic exchange arrangement between Level 3 and Neutral Tandem to allow for an orderly transition; and,
- 4) The terms and conditions for the exchange of traffic between these two parties should be based on commercial negotiations.

Level 3's reply to Neutral Tandem's Mediation Statement indicates a shift of Neutral Tandem's focus from an obligation to interconnect argument to a compensation issue focus.

Level 3 believes that Neutral Tandem's omission of any citation to authority that the Commission could apply to compel interconnection is fatal to Neutral Tandem's case.

Presuming that interconnection is required, Neutral Tandem argues that Section 305a requires the originating carriers to compensate Level 3 for the exchange of traffic. While that is true, Level 3 believes that it is still entitled to receive compensation from Neutral Tandem at commercially negotiated rates.

Level 3 states that Section 305a (5) establishes an obligation on the originating carrier (i.e. the cellular provider that originates the call) to establish reciprocal compensation arrangements with Level 3. Section 305a (5) does *not* say that the transit provider has no obligation to compensate the terminating carrier for the costs incurred in establishing and maintaining the interconnection with the transit provider. Level 3 will terminate the call, and will route the traffic on behalf of the originating carrier, and is entitled to receive compensation from the originating carrier. But Section 305a does not bar or prohibit Level 3 from insisting in the commercial negotiations of the agreement that Neutral Tandem pay additional compensation for the termination of traffic delivered by Neutral Tandem. Level 3 believes that if there is an

obligation to directly interconnect, then there is also an obligation imposed on Neutral Tandem to compensate Level 3.

Neutral Tandem argues that if Level 3 is not able to collect reciprocal compensation from originating carriers that is owed to Level 3 by those originating carriers, it is barred from collecting such compensation from Neutral Tandem. Level 3 believes that if the Commission concludes there is an obligation on Level 3 to directly interconnect with Neutral Tandem, whether Level 3 does or does not receive compensation from originating carriers does not change Neutral Tandem's independent obligation to compensate Level 3 for its interconnection. Neutral Tandem cites to no provision that excuses a transit provider from having to compensate carriers with whom it directly interconnects for the exchange of traffic.

In response to Neutral Tandem claims that it is unlawful for Level 3 to threaten to discontinue the traffic exchange arrangement with Neutral Tandem for its refusal to compensate Level 3 they respond that such a claim is based on the assumption that Level 3 is prohibited from requesting compensation in the negotiation of the parties' commercial agreement. Level 3 believes this assumption is incorrect.

### **III.**

#### **DISCUSSION AND RECOMMENDED SETTLEMENT**

There were several overriding factors that swayed the Mediator in making his Final Recommendation. These factors weighed heavily in favor of the position advanced by Neutral Tandem.

Level 3 set forth its position that the Commission lacked jurisdiction in the disputed matter. This issue was ignored by the Mediator for the simple fact that the Commission Order

dated March 21, 2007 “found that MCL 484.2203(14) should be invoked and the parties should be directed to engage in alternative dispute resolution as provided in MCL 484.2203a.” (pg. 3). Subsequently, this Mediator was appointed to issue a recommended settlement making the issue moot in the context of this mediation.

The mediator also felt that important peripheral matters were implicitly addressed in the Order invoking the alternative dispute resolution process. By ordering the dispute to this process the Mediator felt that the Commission had implicitly addressed the determination of Neutral Tandem as a “provider” of a “telecommunications service” (MTA Section 102(ff)(gg)).

The next factor, one of considerable weight to the Mediator, was the past policy determinations of the Commission related to tandem transit. These past Commission references all supported the positions set forth by Neutral Tandem.

First, Neutral Tandem cites a clear delineation of compensation responsibilities in the transiting context under Michigan law where the Commission found that a transiting carrier should not “have to act as a billing agent or conduit for compensation between carriers that transit its network”, (Order Case No. U-12465, November 20, 2000, pg. 19).

Second, Neutral Tandem states that Level 3’s attempt to obtain reciprocal compensation payments from Neutral Tandem not only violates Michigan law, but also hinders competition in the provision of transiting services. The Commission has found that tandem transit service is important in order to help allow “a competitive marketplace to flourish.” (Commission Order, November 26, 1996, Case No. U-11151-11152, pg.14)

The Commission most recently, in comments filed with the FCC regarding the *Missoula* plan, expressed concern about the development of competitive alternatives to the ILECs’ tandem transit services (MPSC Reply Comments, Feb. 1, 2007, pg. 3-4). Level 3’s refusal to abide by

MTA Sections 305(a) and (b) threatens to undermine the only independent provider of tandem transit services in Michigan, in contravention of the Commission's stated interest in promoting competition in the tandem transit market.

Two other factors that came into play in determining the Mediator's final recommendation were the issues of discrimination and compensation. Regarding the issue of discrimination one would expect that all tandem transit providers would be afforded equal treatment. There seemed to be no disagreement of the parties that neither AT&T nor Verizon were required to compensate Level 3 for tandem transit service on outside originated traffic terminated on Level 3. The mediator finds it hard to justify Neutral Tandem being treated differently.

The concept of compensation for transit traffic that Level 3 espouses is based on the assumption that there are extra costs incurred due to Neutral Tandem's interconnection and that they should pay them. Neutral Tandem responds that there are no extra costs involved. Whether or not there are additional costs or not cannot be determined in the context of this mediation. Even so, it appears unnecessary for the purposes of this proceeding. The Mediator believes that Level's 3 compensation proposal should be rejected. The Mediator believes that the compensation obligations are between the originator and the terminator of traffic and should not affect the tandem transit provider, in this case Neutral Tandem.

After a review of the parties Statements of Position filed on April 20, 2007 and the Replies to these statements filed on April 27, 2007 the Mediator has determined and recommends that:

- 1) Neutral Tandem provides "tandem transit" services. These services allow carriers that are not directly interconnected with Level 3 to deliver traffic to Level 3's network through Neutral Tandem.



- 2) The parties previously exchanged traffic pursuant to negotiated agreements. This dispute arose when Level 3 terminated those agreements and stated it would terminate the parties' existing interconnections as of March 23, 2007, which date Level 3 unilaterally extended to June 25, 2007.
- 3) The parties' dispute involves Level 3's requirement that Neutral Tandem pay it "reciprocal compensation" in order maintain a direct interconnection for the continued delivery of tandem transit traffic.
- 4) Neutral Tandem believes that Level 3's requirement to receive reciprocal compensation payments for the termination of tandem transit traffic is contrary to MTA Section 305a, which requires Level 3 to collect reciprocal compensation from the originating carriers. Neutral Tandem provides caller identification information to Level 3 so that Level 3 can identify and bill originating carriers.
- 5) Level 3 believes that, because Neutral Tandem is not an ILEC, it should be free to arrive at a compensation arrangement with Neutral Tandem through commercial negotiation. Level 3 further believes that, if the parties are unable to reach agreement on compensation terms, Level 3 should be free to terminate the parties' existing interconnections.
- 6) Upon consideration of the arguments advanced by each party, I find that this dispute primarily is one of established law and policy. I agree with Neutral Tandem that Level 3's attempt to require Neutral Tandem to make "reciprocal compensation" payments, when Neutral Tandem is delivering traffic originated by other carriers, is inconsistent with MTA Sections 305(a), 305(b), and 305a. I find that Michigan law directs Level 3 to recover reciprocal compensation from originating carriers. It appears undisputed that Level 3 has not filed any tariffs to obtain compensation from originating carriers, has not attempted to negotiate agreements with originating carriers to provide for reciprocal compensation, and has not sought the assistance of the Commission to resolve any disputes with originating carriers related to this issue, all of which MTA Section 305a allows it to do.
- 7) I further note that, although Level 3 claims that it should be free to arrive at the terms of interconnection with Neutral Tandem through commercial negotiation, Level 3 is not free to insist upon terms that are contrary to Michigan law, and it is not free to discontinue existing interconnections with Neutral Tandem because of Neutral Tandem's refusal to agree to compensation arrangements that are contrary to Michigan law.

**IV.**

**CONCLUSION**

For all of the above reasons, I recommend that the parties work towards an agreement in a form similar to the agreement proposed by Neutral Tandem attached as Exhibit A to its April 20, 2007 Statement of Position.

The parties may accept or reject this recommended settlement within seven days. Should either party reject the recommended settlement, a pre-hearing conference will be held on June 6, 2007 before Administrative Law Judge Sharon L. Feldman.

MICHIGAN PUBLIC SERVICE COMMISSION

---

Thomas L. Saghy, Mediator

May 21, 2007

Issued and Served    May 21, 2007